IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 328.

ELI BUNCH, *Petitioner,*

vs.

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF OF RESPONDENTS.

In obedience to the order of this court that counsel file briefs more particularly setting forth the statutes under which it is claimed that the leases involved in this suit are void, we hereby submit the following supplemental brief on behalf of the respondents.

It is admitted in the agreed state of facts that the petitioner Eli Bunch is a full-blood Cherokee Indian enrolled and recognized as such.

That he is the allottee of the land described in plaintiff's petition and was at the time of the institution of this suit the legal owner thereof.

That during the year 1915, the plaintiff rented said land to the defendants for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use of said land for the year 1916 and that the defendants used and occupied said land under said written contract.

That during the year 1916, on the 5th day of July, the plaintiff again re-rented said land to these defendants for the year 1917, by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year 1917, for a cash rental of $75.00, which sum was paid then and there by the defendants and accepted by the plaintiff in full for the use and occupation of said land for the year 1917, and that defendants occupied said land during the year 1917, as tenants of plaintiff under said contract.

Thereafter, to-wit: on July 28th, 1917, these defendants went to Mary Sunday the mother of plaintiff, in regard to the renting of said land and thereupon said Mary Sunday as the agent of plaintiff, Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these defendants the said allotment of land for a cash consideration of $75.00 and that these defendants

used and occupied said land during the year 1918, under said written contract with Mary Sunday as the agent of the plaintiff.

Under Act of May 27th, 1908, Sec. 2 of said Act, provides:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, that leases of restricted lands for oil, gas and other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior and not otherwise: *And provided further*, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Also Sec. 5 of the Act of May 27th, 1908, is as follows:

> "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or af-

ter the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

The Supreme Court of the United States in the case of *United States* v. *Noble,* found in 237 U. S. 74, 35th Sup. Ct. 532, 59th L. ed. 844, has held these leases to be void because they lap over and could not be executed in 1916, in July of that year for the following year of 1917, and our Supreme Court has followed the decision of the Supreme Court of the United States in the case of *Brown* v. *Van Pelt,* 64 Okl. 109, 166 Pac. 102; *Apple* v. *Pierce,* 56 Okl. 13, 155 Pac. 892; *Riordon* v. *Smith,* 62nd Okl. 48, 161 Pac. 798; *Boxley* v. *Scott,* 63rd Okl. 152, 162 Pac. 688.

We conceded in our original brief that these leases were void and could not be enforced, but we contend that this is not the question at issue in this case. If this was in truth to recover possession of the land because of the invalidity of the contract, the plaintiff could certainly recover, but this is not a suit to recover the land but is a suit to recover rents and profits for the years these respondents occupied said land under said void contracts.

Under our theory of the law the respondents were tenants at will of the petitioner. They were on his land under written contract, which, though void,

was with the full consent of the petitioner. This alone would make them tenants at will. The price for the rental was fixed by agreement and promptly paid by the respondents to the petitioner and which was accepted in full satisfaction for the leasing of said land.

We further contend that the void contract under which these respondents took possession of the land from the petitioner fixed the amount of the rental that was to be paid and which was paid and accepted by the petitioner as binding on both parties, and authorities to support this contention were cited in our original brief filed herein.

Respectfully submitted,

BENJ. MARTIN, JR.,
Attorney for Respondents.